Court No.2
Reserved Judgment
IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL.

(1) income Tax Appeal No. 448 of 2001
(Old No.326 of 2000)

1. Commissioner of Income Tax, Meerut,
2. Deputy C.I.T. (Asstt.) Special Range-I, Dehradun.

..... Appellants

Versus

M/s Hyundai Heavy Industries Co. Ltd.,
Commerce Centre, Unit No. 6 & 7, 17th floor,
Cuffe Parade, Colaba, Bombay-05.

..... Respondent

(2) Income Tax Appeal No.473 of 2001
(Old No. 13 of 2000)

1. Commissioner of Income Tax, Meerut,
2. Deputy Commissioner of Income Tax (Assessment) Special Range-I, Dehradun.

..... Appellants

Versus

M/s Hyundai Heavy Industries Co. Ltd.,
Commerce Centre, Unit No. 6 & 7, 17th floor
Cuffe Parade, Colaba, Bombay.

..... Respondent

(3) Income Tax Appeal No.474 of 2001
(Old No. 14 of 2000)

1. Commissioner of Income Tax, Meerut,
2. Deputy Commissioner of Income Tax (Assessment) Special Range-I, Dehradun.

..... Appellants

Versus

M/s Hyundai Heavy Industries Co. Ltd.,
Commerce Centre, Unit No. 6 & 7, 17th floor,
Cuffe Parade, Colaba, Bombay-05.

..... Respondent

(4) Income Tax Appeal No.475 of 2001
(Old No. 15 of 2000)

1. Commissioner of Income Tax, Meerut,
2. Deputy Commissioner of Income Tax
(Assessment) Special Range-I, Dehradun.

..... Appellants

Versus

M/s Hyundai Heavy Industries Co. Ltd.,
Commerce Centre, Unit No. 6 & 7, 17th floor,
Cuffe Parade, Colaba, Bombay.

..... Respondent

Sri Pitamber Maulekhi, learned counsel for the appellants,
Sri Arvind Vashisth, learned counsel for the respondent.

Date: March 30, 2006

Hon'ble P.C.Verma,J.
Hon'ble B.C. Kandpal,J.

(Delivered by Hon'ble P.C. Verma,J.)

All these appeals involving connected issues were heard together and are being disposed of by this common order.

2. Appeal No.448 of 2001 (Old No.326 of 2000) has been filed by the appellants against the judgment and order dated 17.02.2000 passed by Income Tax Appellate Tribunal, New Delhi **(in short 'ITAT')** in I.T.A. No. 8751(Del)/92 (Assessment year 1989-90), whereby the ITAT has allowed the appeal filed by the assessee in part.

Appeal Nos.473/2001, 474/2001 & 475/2001 have been filed by the appellants against the common order dated 03.5.2000 passed by Income Tax Appellate Tribunal, New Delhi **(in short 'ITAT')** in ITA Nos.2494/Del/93 (Assessment years 1986-87, 1987-88

and 1988-89), 5612/Del/91 and 5467/Del/91 respectively (both Assessment years 1987-88 and 1988-89), whereby the learned ITAT has dismissed the cross objections of the Revenue on the agreement of the parties that the issue involved in the present cross objections stand covered in favour of the assessee by the decision of the Tribunal in I.T.A. Nos. 162 to 165 (Del) of 1998 dated 29th March, 2000.

3. Brief facts are that the assessee is a non-resident foreign company incorporated in South Korea. It entered into an agreement with Oil and Natural Gas Commission (ONGC) on 12.3.1985 in respect of the South Bassein Field Central Complex Facilities (hereinafter referred to as the 'Project'). The services under the contract comprised design, engineering, fabrication, installation, commissioning and the outside India portion of the work involved designing, engineering and fabrication. The Company had filed returns for the assessment years 1987-88 and 1988-89 declaring Nil income. In the income of return the assessee claimed, inter alia, that it did not have a Permanent Establishment (hereinafter referred to as 'PE') in India, in terms of Article 5 of the Convention for Avoidance of Double Taxation between the Government of India and Government of Korea (hereinafter referred to as 'CADT') and, therefore, in accordance with Article 7 it was not assessable to tax in India. It was claimed that the Indian operations under the contract commenced on 01.11.1986 and these were completed on 12.4.1987 and since the period was less than 9 months, it would not constitute a 'PE' in India. The assessee also referred to a communication dated 11.2.1987 from the ONGC which

stated that the execution of work relating to Indian portion had commenced from 09.12.1986 at the off shore location and tentative completion was scheduled by the end of March. The assessment for both the assessment years was completed on 29.3.1990 holding that the company was having PE for both the assessment years and assessed income taking 2% on receipts in respect of inside India activities. Notice was issued for the assessment year 1986-87 on 30.3.1990 and assessment was completed on 08.6.1992 under Double Taxation Avoidance Agreements.

4. Aggrieved with the Assessment Orders, assessee preferred appeals before the Commissioner of Income Tax (Appeals), Dehradun who held that the Assessee Company did have a 'PE' but reduced the income in respect of receipts for outside India operations to 1% and for inside India operations to 10%, taking principle of Instruction No.1767 dated 01.7.1987.

5. Aggrieved with the order of CIT (Appeals), the assessee company preferred second appeal for all the three years before the Income Tax Appellate Tribunal. The ITAT upheld the findings of CIT (Appeals) as regards PE but reduced income to 3% in respect of inside India activities and Nil in respect of outside India activities. The ITAT in its judgment recorded finding that no income accrued to the assessee in India in respect of the activities admittedly carried on in Korea. In respect of income for inside India activities the ITAT upheld the finding of the Assessing Officer for application of Section 145 rejecting the claim of the assessee Nil income. It was also recorded that Instruction No.1767 is after all a

guideline and computation can be made under the relevant provisions of the Act read with the guidelines.

6. We heard the learned counsel for the parties and perused the impugned judgment. The learned counsel for the appellants raised a question that whether the learned ITAT was correct in taking a contradictory approach. The learned ITAT has given a specific finding regarding Permanent Establishment in Para 44 (B) of its judgment. On the question whether the assessee had a PE in India, Article 5 of the CADT is being reproduced as under:-

> "(1) For the purpose of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.
>
> (2) The term "permanent establishment" shall include especially -
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> (a) a place of management;
> (b) a branch;
> (c) an office;
> (d) a factory;
> (e) a workshop; and
> (f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.
>
> (3) The term "permanent establishment" likewise encompasses a building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only where such site, project or activities continue for a period of more than nine months."

The ITAT in its judgment has recorded that the learned counsel stated that sub-clause (1) of the Article 5 of the CADT generally provided that affixed place of business would be regarded a "PE" if the assessee carried on his business wholly or partly from this fixed

place. Article 5(2) provided that the term "PE" would include six locations referred to therein. According to the learned counsel, the six locations could become PEs only if they satisfied the tests laid down in Article 5 (1) i.e. the business of the enterprise was wholly or partly carried on through such locations. Article 5(3) according to the learned counsel was a specific provision and it was well-settled that a specific provision overrides the general provision. The plea in concluding was that Article 5(3) was an exception to Article 5(1) and Article 5(2) and where a building, side or construction assemble or installation project does not exist for a period exceeding nine months, an office rendering support services to such project could not be regarded as a PE within the meaning of Article 5(1) and 5(2) since Article 5(3) was a specific provision. The ITAT has also recorded in its finding that we are not sufficiently convinced to treat income from India operations at Rs. NIL for assessment year 1988-89, specially when the assessee had failed even before the tax authorities to support its facts and figures and we have upheld application to Section 145. The ITAT was right in rejecting the argument of zero profit on the Indian operations and to accept the alternative argument holding that Instruction No. 1767 is after all a guideline and computation can be made under the relevant provisions of the Act read with the guidelines themselves.

8. The ITAT after detailed discussions held that Instruction No.1767 is after all a guideline and computation can be made under the relevant provisions of the Act read with the guidelines themselves and further held that it would be fair and reasonable if profits

from Indian operations are worked out by applying a rate of 3%. With the agreement of the learned counsel for the parties, the ITAT has rightly held that a specific provision would override a general provision.

8. All the issues in appeals are concluded by finding of fact.

9. Thus, in our opinion, no substantial question of law arises to be answered in these appeals.

10. We find no illegality or infirmity in the order of the ITAT and we are in agreement with the orders passed by the ITAT. The impugned orders do not require any interference of this Court in appeal.

9. All the appeals are dismissed accordingly. No order as to costs.

(B.C. Kandpal, J.) (P.C. Verma, J.)

Dated: March 30, 2006
P.Singh